STATE OF MICHIGAN

COURT OF APPEALS

GOLF PARCHMENT, L.L.C., formerly known as DOJO, L.L.C.,,	UNPUBLISHED May 12, 2005
Plaintiff-Appellant,	
v	No. 260000 Kalamazoo Circuit Court
CITY OF PARCHMENT,	LC No. 03-000651-CK
Defendant-Appellee.	

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case arises from the parties' execution of an agreement in 2002 for the purchase of approximately ninety acres of land along the banks of the Kalamazoo River. The initial concept for the development involved construction of hundreds of residential units, along with commercial buildings and a golf course, without imposing significant infrastructure costs on plaintiff. On June 16, 2003, defendant's city commission approved a concept plan with those features, but no specific development agreement was formally executed.

Closing was originally set for December 1, 2002, but depended on each party performing certain tasks and providing certain warranties, and on the parties' execution of a mutually acceptable development agreement. In response to problems in clearing title to the land, the parties agreed to several extensions of deadlines, the last moving the proposed closing to November 30, 2003.

In late July 2003, defendant's city manager indicated that he would not recommend further extensions unless there was significant progress on plaintiff's obligation to provide documentation of financing, along with marketability and feasibility studies. On November 13, 2003, plaintiff presented a revised development plan by letter, and asked for a ninety-day extension. This new plan did not include the golf course as part of the project. Defendant's city council met on November 17, 2003, and decided against another extension of the closing date. On November 25, 2003, plaintiff tendered a check for the purchase price along with a development plan. The latter again did not include a golf course, and obligated defendant to pay

for various infrastructure improvements. Plaintiff announced that it was waiving all conditions, and that closing should go forward on November 30, 2003.

Defendant did not respond to this latest proposal, in light of the lack of a regularly scheduled council meeting in the few days before the November 30 deadline, which allowed only two days' consideration before the long Thanksgiving weekend finished out the month. The final closing date thus passed without action.

Plaintiff brought suit, seeking specific performance or damages for breach of contract. Defendant moved the trial court for summary disposition pursuant to MCR 2.116(C)(8) and (10), and plaintiff's response included a cross-motion for partial summary disposition, seeking a declaration that defendant had breached the parties' purchase agreement by failing to remove the paper-manufacturing presses from the site. The court granted defendant's motion, and declined to decide the substance of plaintiff's. This appeal followed.

Plaintiff argues that the trial court erred in regarding the subsequent execution of a development plan as a condition precedent to the enforceability of the parties' purchase contract, in concluding as a matter of law that defendant was not unreasonable in refusing to consider the latest proposed such plan, and in failing to grant plaintiff partial summary disposition in light of defendant's failure to remove certain paper-manufacturing equipment from the subject property.

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ." *Id.* "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). This Court accepts as true all factual allegations in the claim "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id*.

Contract interpretation poses a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Co*, 466 Mich 402, 408; 646 NW2d 170 (2002). If the language is clear, "the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). The various parts of a contract should be read together. See, e.g., *First Baptist Church v Solner*, 341 Mich 209, 215; 67 NW2d 252 (1954); *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170; 600 NW2d 617 (1999). Specific provisions normally override general ones. *Sobel v Steelcraft Piston Ring Sales, Inc*, 294 Mich 211, 219; 292 NW 863 (1940); *Haefele v Meijer, Inc*, 165 Mich App 485, 498; 418 NW2d 900 (1987), remanded on other grounds 431 Mich 853 (1988).

Paragraph 16 of the parties' purchase agreement provides as follows:

> As soon as possible after the date of this Agreement, the parties shall prepare and execute a development agreement which describes each phase or milestone of Buyer's intended development of the Subject Property, establishes an outside date for completion of each milestone, and sets forth penalties for

> failure to complete each phase or milestone, all in form and substance mutually acceptable to the parties. Seller shall have no obligation to close unless and until such development agreement is executed by the parties. Neither party shall unreasonably refuse to execute such development agreement.

This provision, considered as a whole, indicates that the development agreement is envisioned as something coming into being after the underlying contract is in effect, the lack of which excuses defendant from proceeding to closing, provided only that that lack is not the result of defendant's own unreasonable refusal to come to terms. Although the trial court characterized this as a condition precedent, because it imposes mutual obligations on the parties, and provides an avenue for termination of a contract in progress as opposed to avoidance of its taking effect in the first instance, it is better characterized as a condition subsequent.[1] See *Archambo, supra* at 411-412; *Reed v Citizens Ins Co*, 198 Mich App 443, 447-448; 499 NW2d 22 (1993). However, the significance of this contract terms does not depend upon precisely what label is affixed to it.

There is no dispute that a development plan was not executed. As noted above, this left defendant with the option not to close unless defendant itself unreasonably prevented execution of such a plan. However, plaintiff argues that a different provision of the parties' contract allowed plaintiff to waive that condition proceeding to closing regardless.

Paragraph 15 of the purchase agreement listed many specific conditions to be satisfied before closing, and concluded as follows:

> If any one or more of the above conditions, or any other contingency contained in this Agreement, is not satisfied by the closing date, Buyer may waive the condition or contingency and proceed to close this transaction, or elect to terminate this Agreement and receive the immediate return of its earnest money deposit.

Plaintiff argues that this provision allows it the option of waiving paragraph 16's requirement that the parties execute a development plan and proceed to closing. If indeed no development plan was executed through no fault of plaintiff, then that would seem to be an "other contingency" that paragraph 15 allows plaintiff to waive. But paragraph 16 explicitly declares that the "Seller shall have no obligation to close unless and until such development agreement is executed." If agreement upon a development plan must indeed be considered a condition or contingency for purposes of paragraph 15, the specific language relieving defendant of any obligation to close if no such agreement is reached must be considered an exception. *Sobel, supra*; *Haefele, supra*.

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[1] According to Black's Law Dictionary (6th ed, 1990), p 293-294, a "condition precedent" is a condition "that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties," while a condition subsequent is "a provision giving one party the right to divest himself of liability and obligation to perform further if the other party fails to meet conditions . . . ."

For these reasons, plaintiff's waiver argument must fail. This leaves the question of defendant's reasonableness in refusing to agree to a development plan.

Plaintiff protests that it was unreasonable for defendant to refuse to give serious consideration to its final proposed development plan, and that defendant was further unreasonable in having frustrated plaintiff's efforts to fulfill the terms of the purchase agreement by failing in its obligation to remove the two large paper-manufacturing presses from the subject property.

Concerning plaintiff's proposal offered five days before the final, November 30, 2003, deadline, the trial court stated as follows:

> City officials were told for the first time on November 17, 2003, that [plaintiff] did not intend to include a golf course, claiming it was no longer feasible. . . . The proposed development agreement provided: 1) there would no longer be a golf course; 2) the developer could amend or alter the nature and extent of the plan, in its sole discretion, if the plan or any project element is infeasible; 3) [defendant] would have to agree to assist [plaintiff] in obtaining public grants, loans, financing, and other funding for the project from any source requested by the developer; 4) [defendant], if requested by the developer, would hold title to the project property if necessary to obtain public funding for the project; 5) the City would construct, at its sole expense, all public streets and public utilities necessary to support the project; 6) as part of the engineering, design and landscape planning for the public street and utilities, and after construction, the City would reimburse the developer for approved engineering and related design costs for the public streets and utilities. Finally, the City was to maintain all public streets and utilities constructed.

The court reiterated that "[t]he project as conceptually approved on June 16, 2003, did not require the City to perform any of the above obligations." Plaintiff does not dispute this recitation of facts,[2] but points to evidence that defendant did not examine this latest proposal at all. However, because it came just five days before the deadline, most of which would be taken up by the traditional long Thanksgiving weekend, and considering defendant's rejection of a request to extend the deadline just days earlier upon receipt of some of plaintiff's proposed revisions, along with defendant's earlier indications that it would not extend closing deadlines indefinitely, we conclude that defendant cannot be considered unreasonable for declining to convene a special meeting of its council, or otherwise have any of its officers make time there and then to consider the matter.

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[2] Except by arguing that defendant had not discussed infrastructure costs initially, thus implying that, within this silence, was the understanding that defendant might end up shouldering substantial infrastructure costs that had not been discussed until the last moments of the long course of the parties' dealings. We find this artful interpretation of events unpersuasive.

Concerning the large presses still on the land, plaintiff argued below that defendant had violated a contractual obligation to remove them, and that their continued presence hindered plaintiff's ability to obtain an environmental assessment, and would interfere with plans to demolish the abandoned paper mills. Plaintiff relies on contract provisions requiring defendant to transfer marketable title free of all encumbrances, including possessory rights of third parties, and to warrant that there are no claims against, or other agreements affecting, the subject property.

On appeal, plaintiff argues only that the failure to remove the equipment threatened plaintiff's ability to take the subject property free of encumbrances for quiet enjoyment. Plaintiff additionally points out that the subcontractor's license to complete the removal of the equipment includes the subcontractor's right to access, i.e., possess, the subject property for that purpose. However, plaintiff does not explain how any specific injury thus suffered led to any specific damages.

The trial court did not decide these questions for the reason that "the failure to remove the equipment can hardly be viewed as a barrier. Everyone was aware of the Equipment *ab initio* and any development agreement could have clearly delineated the obligations to remove it. This was not a cloud on the title . . . ." The court added that plaintiff "can hardly argue that the parties were in a position to readily close the real estate transfer in any event. If [plaintiff] was willing to so drastically change and further negotiate regarding the project, it certainly cannot now raise the Equipment as an issue." We agree with the trial court.

If plaintiff has indeed identified some defects in title that may be attributed to defendant's failure to complete the removal of the paper presses in timely fashion, it remains nonetheless difficult to see why the trial court should have granted declaratory judgment in the matter. At issue was the reasonableness of defendant's refusal to consider and adopt plaintiff's final proposed development plan. As discussed above, defendant was not unreasonable in declining to consider a new proposal submitted just a few days before the Thanksgiving weekend and the final deadline, especially since the final proposal departed in significant ways from the parties' initial ideas for the project. If the parties' failure to agree on certain particulars a development plan could be traced to specific adjustments plaintiff was obliged to make in response to having to contend with the continued presence of the paper presses, plaintiff's argument might bear on the question of defendant's reasonableness in the matter. But plaintiff nowhere argues that its decision to remove the golf course from the development plan, or insert an obligation on the part of defendant to assume infrastructure costs, along with the other last-minute changes noted by the trial court, were responses to pressures emanating from the prolongation of the process of removing the paper presses. Nor does plaintiff suggest why such pressures obligated defendant to consider a last-minute proposal arriving so inconveniently close to the final deadline.[3]

[3] Moreover, plaintiff reports that defendant sold the paper presses in April 2003, with the understanding that the buyer would remove them beginning one week later, and does not attribute the delays in completion of that project to defendant. The latter thus appears to have made reasonable, if not successful, efforts to fulfill its obligations in that regard.

Because dismissal of the entire cause would have been appropriate in any event, the trial court did not err in declining to consider or grant the partial declaratory relief plaintiff sought.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter